Ref. No. 335

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

IN RE CHARGE OF JAIME GIRON	)	
	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	8 U.S.C. § 1324b Proceeding
	)	
v.	)	CASE NO. 90200307
	)	
HARRIS RANCH BEEF COMPANY,	)	
Respondent.	)	
	)	

ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION AND RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

I. Procedural History

This case was initiated by the filing of a Complaint by the Office of Special Counsel (hereinafter "Complainant") on October 10, 1991, charging Harris Ranch Beef Company (hereinafter "Respondent" or "Harris Ranch") with violating 8 U.S.C. § 1324b for alleged discrimination in hiring against Jaime Giron on the basis of his citizenship status. On October 24, 1990, Respondent filed its Answer, generally denying the allegations of Complaint.

On February 25, 1991, Compl[illegible] Complaint, seeking to incorpora made by Section 533(a) of the Ir a pattern or practice count al policy of requiring non-U.S. c immigration card in addition identification card and a soci Motion to Amend Complaint was gr 17, 1991.

Respondent filed its An Complaint on April 24, 1991. forth three (3) affirmative de Amended Complaint, which are a Counts I and II, Respondent alle

under 8 U.S.C. § 1324b(a)(3)(B) because he did not file a va application for naturalization on or before February 7, 199 (2) With respect to Counts I and III, Respondent alleges t these counts are time-barred since they allege violations sections of the Immigration Act of 1990, which are retroactive[2]; and (3) With respect to Counts I and I Respondent alleges that these counts are barred by the doctr of unclean hands since Complainant failed to properly educ employers concerning the requirements of IRCA.[3]

On April 30, 1991, Complainant filed a Motion for M Definite Statement and to Strike Affirmative Defens Respondent filed its Opposition to Complainant's Motion for M Definite Statement and to Strike Affirmative Defenses on May 1991. I issued an Order denying Complainant's Motion for a M Definite Statement of Respondent's First Affirmative Defen granting Complainant's Motion to Strike Respondent's Sec Affirmative Defense, and denying Complainant's Motion to Str Respondent's Third Affirmative Defense on May 20, 1991.

On April 17, 1991, Complainant filed its Motion for Part Summary Decision, pursuant to 28 C.F.R. § 68.36, on the grou that no genuine issue of material fact exists with respect Respondent's liability under 8 U.S.C. § 1324b on all Cou alleged in the Amended Complaint.

Respondent filed its Opposition to Motion for Partial Summ Decision and its Cross-Motion for Summary Adjudication of Iss and/or Judgment on the Pleadings on May 16. 1991.[4] In Opposition to Motion for Partial Summary Decision, Respond argues that Complainant's motion should be denied beca

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[1]To be a "protected individual," 8 U.S.C. § 1324b(a)(3)(requires that a lawful permanent resident have applied f naturalization within six months of the date the alien fir became eligible to apply for naturalization.

[2]i.e. Respondent's request for more or different documer is an unfair immigration-related employment practice, pursuant Section 535 of the Immigration Act of 1990.

[3]This alleged affirmative defense may reasonably construed as an estoppel defense.

[4]In support of its cross-motion, Respondent also filed May 16, 1991, its Separate Statement of Undisputed Facts, as we as several supporting declarations.

"material issues of fact exist as to: 1) whether or not additional documents were required from Mr. Giron at the time he applied for a job with Harris Ranch; 2) whether or not Mr. Giron was denied employment based on his citizenship status; 3) whether or not Mr. Giron has standing under 8 U.S.C. § 1324b; and 4) whether or not Harris Ranch discriminates against non-citizen job applicants on a regular, repeated and intentional basis." Respondent further argues that, "as a matter of law, Count III, alleging a pattern or practice [of discrimination], is legally insufficient to constitute a violation of [8 U.S.C. section 1324b]." In its Motion for Judgment on the Pleadings and/or Cross-Motion for Summary Adjudication of Issues, Respondent argues that Counts I and III fail to state causes of action for which relief can be granted for actions occurring prior to November 29, 1990,[5] since they actually allege violations of 8 U.S.C. § 1324b, as amended by Section 535 of the Immigration Act of 1990.

Complainant filed its Reply to Points and Authorities in Support of Respondent's Opposition to Motion for Summary Decision, its Response to Motion for Judgment on the Pleadings, and its Response to Cross-Motion for Summary Adjudication of Issues on May 28, 1991. In its Reply, Complainant mainly argues that Respondent has failed to raise genuine issues of material fact and that Respondent's First Affirmative Defense, which alleges that Mr. Giron lacks standing, is without merit. In its Response to Motion for Judgment on the Pleadings, Complainant essentially argues that Respondent's motion should be denied because Counts I and III do not allege violations of Section 535 of the Immigration Act of 1990; rather, they allege claims of discrimination.[6] Complainant argues in its Response to Cross-Motion for Summary Adjudication of Issues that Counts I and III do state claims for which relief can be granted under pre-amendment 8 U.S.C. § 1324b, since pre-amendment decisional law reveals, in its view, that "liability [is] established by the

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[5]November 29, 1990, is the
tion Act of 1990.

[6]It should be noted that Se
of 1990 is entitled "TREATMENT
NATION."

demand for specific documents based on the victim's citizenship status . . . ."[7] (emphasis added)

II. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.36 (emphasis added); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

In other words, summary decision will be granted only if the record, when viewed in its entirety, is devoid of a genuine issue as to any fact that is outcome determinative. See Anderson v. Liberty Lobby, Inc., supra; see also, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 480 ("An issue is not material simply because it may affect the outcome. It is material only if it

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[7]It is quite possible that some of the confusion about whether Complainant is alleging a violation of the Immigration Act of 1990 or a violation of pre-amendment 8 U.S.C. § 1324b stems from the phrasing of some of Complainant's allegations; i.e. Complainant alleges in its First Amended Complaint that Respondent violated 8 U.S.C. § 1324b by requiring INS-issued work authorization documents. However, the word "demand" can reasonably be interpreted as a request, rather than a requirement, see Webster's II New Riverside University Dictionary (1984), and Section 535 of the Immigration Act of 1990 indicates that an employer's request for more or different documents to prove work authorization is sufficient to constitute an unfair immigration-related employment practice. To avoid confusion and inconsistency, I am interpreting the word "demand" as a requirement.

must inevitably be decided."). A fact is "outcome determinative" if the resolution of the fact will establish or eliminate a claim or defense; if the fact is determinative of an issue to be tried, it is "material." Id.

Rule 56(c) of the Federal Rules of Civil Procedure also permits, as the basis for summary decision adjudications, consideration of any "admissions on file." A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982); see also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) ("If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted."); and U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact.).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.8(c)(1). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (". . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment."); see also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardisty, 262 F.2d 621 (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Finally, in analyzing the application of summary judgment/summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be "particularized" in order to cut off an applicant's hearing rights. See Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) (". . . the standard of 'well controlled investigations' particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence . . . .").

IV. Findings of Fact and Conclusions of Law

A. Complainant's Motion for Partial Summary Decision

Upon thoroughly reviewing Complainant's Motion for Partial Summary Decision and all other relevant pleadings, documents, and evidence submitted by the parties, I find that the following genuine issues of material fact remain to be litigated: (1) whether Respondent required Jaime Giron to produce an INS-issued document, in addition to his driver's license and social security card, to prove his work authorization when he applied

for a job with Respondent on April 20, 1990; (2) whether Mr. Giron was denied employment based upon his citizenship status; (3) whether Respondent had/has a policy of requiring all non-U.S. citizen job applicants to produce an INS-issued document to prove work authorization; (4) assuming, arguendo, that Respondent did have a policy of requiring all non-U.S. citizen job applicants to produce an INS-issued document to prove work authorization, was the policy discriminatory; and (5) whether Complainant has failed to state a claim upon which relief can be granted with respect to Counts I and III of the First Amended Complaint. Therefore, I am denying Complainant's Motion for Partial Summary Decision.

I do not include among the aforementioned genuine issues of material fact the question of whether Mr. Giron is a "protected individual," as required by 8 U.S.C. § 1324b(a)(3)(B), because I view that question as one of law rather than one of fact. The legal question is, specifically, whether 8 U.S.C. § 1324b only requires an individual be a "protected individual" at the time of the alleged act(s) of discrimination or throughout these proceedings.

8 U.S.C. § 1324b(a)(1)(B) provides that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien . . .) with respect to . . . hiring . . . in the case of a protected individual . . ., because of such individual's citizenship status." A "protected individual" is defined, in part, as an individual who is an alien lawfully admitted for permanent residence, but does not include "an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible . . . to apply for naturalization . . . ."

As indicated by the parties' pleadings, Mr. Giron is an alien lawfully admitted for permanent residence who became eligible to apply for naturalization on August 7, 1990. Although there might be a question of whether Mr. Giron applied for naturalization by February 7, 1991 (six months from the date he became eligible to apply), the question is not relevant to this proceeding since Mr. Giron was, in my view, a "protected individual" on April 20, 1990, the time of the alleged discrimi-
ion. He was an alien lawfully admitted for permanent
to timely apply for naturaliza-
to apply. In my view, it is
:he statute as requiring an
ndividual" at the time of the
As Complainant points out in
pretation might result in such
sing his/her right to proceed
ess because the individual was
turalization, even though the
ividual" at the time of the

alleged discrimination. Having thus concluded that Mr. Giron is a "protected individual," no material question of fact regarding Mr. Giron's "standing" remains to be litigated. However, as discussed above, several genuine issues of material fact do remain to be litigated.

B. Respondent's Motion for Judgment on the Pleadings and/or Cross-Motion for Summary Adjudication of Issues

As with Complainant's motion, I find upon carefully reviewing Respondent's Motion for Judgment on the Pleadings and/or Cross-Motion for Summary Adjudication of Issues[8] and all other relevant pleadings, documents, and evidence submitted that the following genuine issues of material fact remain to be litigated: (1) whether Respondent required Mr. Giron to produce an INS-issued document to prove his work authorization; (2) whether Mr. Giron was denied employment based upon his citizenship status; (3) whether Respondent had/has a policy of requiring all non-U.S. citizen job applicants to produce an INS-issued document to prove work authorization; (4) assuming, arguendo, that Respondent did have a policy of requiring all non-U.S. citizen job applicants to produce an INS-issued document to prove work authorization, was the policy discriminatory; and (5) whether Complainant has failed to state a claim upon which relief can be granted with respect to Counts I and III of the First Amended Complaint. Therefore, I am denying Respondent's Motion for Judgment on the Pleadings and/or Cross-Motion for Summary Adjudication of Issues.

It should also be noted that, although the pleadings submitted strongly suggest that there is significant confusion at this point in the proceedings about whether Complainant is indeed alleging violations of 8 U.S.C. § 1324b, prior to its amendment by Section 535 of the Immigration Act of 1990, in Counts I and III of the Complaint, I am making a determined effort to understand what Complainant is attempting to set forth and construing the pleading in its favor so as to ensure Complainant's right to have its claims substantial justice in this case. This

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[8]Consistent with Federal I
am treating Respondent's motio
since I am considering evide
Wright and Miller, 5A Federa
1371 (1990); U.S. v. Duffy,
C.F.R. § 68.1. It is my view
dent entitled its motion suffi
the Motion for Judgment on th
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with that of the Federal Rules of Civil Procedure[9] and federal case law interpreting the Federal Rules. See Wright and Miller, 5 Federal Practice and Procedure sections 1202 and 1286 (1990); and Jenkins v. McKeithen, 395 U.S. 411 (1969), reh'g denied 396 U.S. 869 (1969). A liberal construction of the pleadings suggests that Complainant has alleged violations of pre-amendment 8 U.S.C. § 1324b[10] and material questions of fact exist as to those allegations. Therefore, as indicated above, I am denying Respondent's Motion for Judgment on the Pleadings and/or Cross-Motion for Summary Adjudication of Issues.

III. Ultimate Findings of Fact and Conclusions of Law

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to Complainant's Motion for Partial Summary Decision

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[9]28 C.F.R. § 68.1 permits me to use the Federal Rules of Civil Procedure as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or any other applicable statute, executive order, or regulation.

[10]Since I am liberally construing Complainant's pleadings and denying the motions for summary decision, I believe providing the parties with my view of the applicable law, prior to its amendment by Section 535 of the Immigration Act of 1990, would assist the parties in preparing their respective cases for hearing. In my view, to prove that an employer knowingly and intentionally discriminated against a prospective employee on the basis of citizenship under 8 U.S.C. § 1324b, prior to its amendment by Section 535 of the Immigration Act of 1990, it is not enough for the Complainant to prove that the employer requested the prospective employee produce a particular document (i.e. an INS-issued document), as it apparently is under Section 535 of the Immigration Act of 1990. Rather, Complainant must prove that the employer required the particular document, and the "requirement" is established by proving that the prospective employee (job applicant) was refused employment or excluded from the hiring process after the prospective employee was unable to produce the document or the document produced was unreasonably rejected. See U.S. v. Marcel Watch Corporation, OCAHO Case No. 89200085 (March 22, 1990); Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202 (June 29, 1990); U.S. v. LASA Marketing Firms, OCAHO Case No. 88200061 (Nov. 27, 1989); U.S. v. Weld County School District, OCAHO Case No. 90200097 (May 14, 1991). In addition, it should be noted that under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and its progeny an element of a prima facie case of discrimination is that the prospective employee was rejected for employment (or was excluded from the hiring process), and our cases have adopted such Title VII analysis. See i.e. Weld County at 6.

and Respondent's Motion for Judgment on the Pleadings and/or Cross-Motion for Summary Adjudication of Issues. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

(1) That, as previously found, genuine issues of material fact have been shown to exist with respect to liability on all counts alleged in the Complaint. Therefore, Complainant's Motion for Partial Summary Decision is denied.

(2) That, having found that genuine issues of material fact exist with respect to liability on all counts alleged in the Complaint, Respondent's Motion for Judgment on the Pleadings and/or Cross-Motion for Summary Adjudication of Issues is denied.

SO ORDERED, this 31st day of May, 1991, at San Diego, California.

Robert B. Schneider

ROBERT B. SCHNEIDER
Administrative Law Judge